

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN J. DEXTER)	
Claimant)	
)	
VS.)	
)	
THE BOEING COMPANY)	Docket Nos. 222,434
Respondent)	239,532
)	
AND)	
)	
INSURANCE CO. STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 13, 2002 Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on October 18, 2002.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The Board also considered the deposition of Sondra Mitchell, dated October 26, 2001 which, at oral argument, the parties agreed was part of the record.

ISSUES

The sole issue in this appeal is the nature and extent of claimant's impairment. The ALJ awarded claimant a functional impairment of 5.5 percent to the body as a whole.¹ The ALJ specifically found claimant failed to make "a good-faith effort to continue to work for the respondent and that the respondent has made a good-faith effort in order to keep the claimant employed."² Accordingly, the ALJ refused to award any work disability.

Claimant alleges that the ALJ erred in finding claimant's efforts to maintain employment with respondent were insufficient or less than sincere. Claimant further asserts that the medical evidence justifies claimant's voluntary decision to terminate his employment relationship with the respondent.

Respondent contends it made repeated attempts to accommodate claimant's restrictions, and continued to do so up until the date claimant tendered his resignation on August 9, 1999. Thus, respondent maintains it has no liability for any work disability as it always had a job available to claimant that was within the restrictions imposed by the treating physician and paid a comparable wage.

FINDINGS OF FACT

After reviewing the entire record and hearing arguments of counsel, the Board finds as follows:

There is no dispute that claimant sustained a repetitive injury to his low back, both in August of 1996, (Docket No. 222,434) and again on October 28, 1998 (Docket No. 239,532). After the 1996 injury, claimant returned to his normal work duties and ultimately resolved his claim. An Agreed Award was entered into on December 12, 1997. During this period of time claimant's job was as a sheet metal mechanic/assembler. His duties required him to attach and assemble parts on the floor beam of the 747 airplanes. It also required him to rotate large metal beams on a regular basis. From August of 1998 until October 28, 1998, claimant testified he suffered from an increase in his low back pain. He was seen by a physician and was taken off work on October 28, 1998.

¹ For purposes of trial, Docket Nos. 222,434 and 239,532 were consolidated. Docket No. 239,532 reflects a claim for a repetitive injury that culminated on October 28, 1998. Docket No. 222,434 is a post-award matter stemming from an earlier accident that was resolved with an Agreed Award on Dec. 12, 1997 with a five percent impairment. The March 13, 2002 Award at issue in this appeal granted benefits solely in Docket No. 239,532.

² Award at 6.

In January of 1999, claimant was returned to work at the same job as before. However, the treating physician had imposed restrictions that prevented him from doing his job and he was sent home. In March of 1999, he was called back to work and respondent gathered a team of individuals who set about accommodating claimant's restrictions and his limitations.

With the assistance of some individuals with ergonomic experience and input from the medical personnel and vocational counselors, the restrictions imposed by the treating physician were evaluated and changes were made to claimant's job. Claimant was also evaluated by Dr. Blake Veenis, a board certified physiatrist, who saw the claimant on May 10, 1999. Dr. Veenis imposed restrictions as well and those were also provided to respondent's medical personnel and the team working on claimant's case. In addition to providing the special adaptive equipment to help him do his job, respondent also arranged for co-workers to assist claimant whenever he needed help to rotate the heavy beams involved in his job.

Although claimant admits these changes were made, he contends they did not truly afford him assistance and did not ease his back complaints. Each time claimant would complain to his supervisor about the work exceeding his restrictions, a meeting among the group of people working on this issue would be called. Between them, they would try to achieve a resolution. Sometimes this involved respondent providing additional equipment such as an adjustable table for his tools. Other times, Dr. Veenis would be called and asked to provide more direction and specificity with regard to his restrictions. In the last month of his employment, this happened four times.

The respondent's records indicate this team assembled 6 to 10 times in the first half of 1999. At one point, Sondra Mitchell, an ergonomics/human factors design specialist, spent two full days with claimant watching him work in an effort to ascertain what aspects about claimant's job could be altered. According to claimant, none of these accommodations provided him any meaningful benefit. As a result, he testified he continued to suffer pain and risk injury while working for respondent.

During this period of time, claimant was having trouble meeting his production guidelines. According to Michael Melzer, claimant's supervisor in the major assembly department, claimant had the capacity to do the job in a timely fashion. However, Mr. Melzer believed that claimant's continuous absences made it impossible for him to learn the job. He didn't think claimant's inability to perform the job had anything to do with his injury. Rather, it was his failure to consistently and routinely perform the job that hampered his ability to meet the time standards. Claimant acknowledged this problem but contends it was not his repeated absences from work that caused his non-productivity. Rather, he was not able to meet his job requirements because the job required him to exceed his restrictions, thus causing pain.

On August 9, 1999, claimant reported to respondent's plant and tendered his resignation to his supervisor. His resignation letter stated, in part:

Due to continuing health problems, and consultation with my family, physicians, and other health care specialists, I believe it is in my best interest to resign my current position with the Company.

Following the presentation of this letter, claimant was contacted by Lisa Urban, an individual in the human resources department at Boeing. They spoke on August 16, 1999. During the course of this conversation, she informed him that respondent was ready and willing to accommodate his restrictions. According to Ms. Urban, claimant admitted he understood that fact, but nonetheless, he was resigning. Ms. Urban further testified that respondent would still be able to accommodate claimant and therefore, he would still be employed had he not quit.

Just after leaving respondent's employment, claimant was evaluated by Dr. Pedro Murati, for purposes of an impairment rating. Dr. Murati reviewed claimant's medical records, x-rays, and conducted his own examination. Following this exam, he diagnosed claimant with a left sacroiliac joint dysfunction along with low back pain secondary to a strain. He agreed with the restriction imposed by Dr. Veenis earlier in 1998 and ultimately assessed a seven percent permanent partial impairment to the body as a whole, attributing all of this impairment to the October 28, 1998 injury. He did not assess any additional permanency to the earlier 1996 accident.

Dr. Murati was also asked whether claimant should have continued working for respondent in light of claimant's indication that his work continued to hurt his low back. Dr. Murati never testified that claimant should not work. He did testify that claimant should not be expected to work outside his restrictions and went on to state that if claimant felt he was sustaining further injury, he should have returned to the doctor so that his complaints could be evaluated and the restrictions could be revised.³

Dr. Veenis was also asked to examine claimant and to provide a rating. Dr. Veenis' diagnosis was similar to that of Dr. Murati's. He indicated claimant was suffering from a lumbar strain, degenerative disk disease and had some evidence of a bulging disk. According to him, claimant's condition improved following conservative treatment but because he was never symptom free following the October 28, 1998 accident, Dr. Veenis assessed a five percent permanent partial impairment to the body as a whole. In addition, he apportioned two percent of this rating to the 1998 accident, one percent to the 1996 accident and assessed the remaining two percent to his pre-existing impairment due to his long standing low back pain.

³ Murati Depo. at 14.

When asked about any conversations he might have had with claimant about the advisability of him continuing to work for respondent, Dr. Veenis testified that it was certainly “reasonable” for claimant to terminate his employment.⁴ However, Dr. Veenis went on to explain that he is generally supportive of any patient’s desire to further his education. It is clear that Dr. Veenis did not advise claimant that he should quit working for respondent because his history of low back complaints. In fact, he testified that he didn’t believe it was certain that continued work for respondent would cause claimant additional injury. He indicated claimant would certainly experience pain while working but not necessarily injury. Moreover, Dr. Veenis testified it was a self-imposed exercise program that quite likely caused claimant to see an improvement in his condition rather than the fact that he stopped working for respondent.⁵

After resigning his employment, claimant testified he sought employment elsewhere, sending out “several” resumes and inquiring at “well over 10” places of employment. These efforts were unsuccessful. In the fall of 1999, he enrolled in college full time in the hopes of completing his undergraduate degree in psychology that he had been working on during night classes while employed by respondent. His full time course work required him to intern at a social service agency which paid him \$5.25 per hour, working 10-25 hours per week. When the semester ended, that job was no longer available to him. Interestingly, the job he performed involved utilizing some of claimant’s computer skills. Not only did he help a social agency design a website, he was also self-employed during this period, sporadically providing computer assistance to acquaintances. Sometimes he was paid in kind, other times as much as \$75 per month.

Claimant graduated in 2001 with an undergraduate degree in human services psychology. He then elected to enroll in graduate school in Emporia State University. There he not only attends classes but he works approximately 16 hours per week, earning \$6.25 per hour.

In addition to this, claimant and his wife are foster parents. This activity generates income but the record does not reveal the extent of this source. Claimant also maintains two web sites which he hopes will generate money for his family but as of the date of the regular hearing, he had not yet realized any money from either of these two sites.

At his lawyer’s request, claimant’s vocational history was reviewed and analyzed by James Molski, a rehabilitation specialist. According to Mr. Molski, claimant has a history of various jobs, including shop assembler, intake worker, photographer and store sales clerk. When analyzed, Mr. Molski concluded that these jobs yielded a total of 25 tasks.

⁴ Veenis Depo. at 26.

⁵ Veenis Depo. at 34-35.

Mr. Molski also offered testimony regarding the salary claimant could expect to earn based upon his post-employment educational efforts. According to Mr. Molski, a new graduate with a psychology degree could expect to find employment in the social service sector that would yield an average weekly salary of \$414.40, plus an estimated \$80-110 per week in fringe benefits. This salary would increase with a graduate degree to an average of \$640 per week. Based upon the pre-injury average weekly wage of \$1,075.95, this would translate to anywhere from a 51 percent wage loss (based upon the undergraduate degree) down to a 30 percent wage loss (based upon the higher wage for a graduate degree). Mr. Molski offered no testimony regarding claimant's job search since leaving respondent's employ.

Each of the testifying physicians was asked to speak not only to the functional impairment but to the task loss, as required by K.S.A. 44-510e(a). According to Dr. Veenis, claimant has lost the ability to perform eight of the 25 tasks outlined by Mr. Molski while Dr. Murati testified that claimant had lost nine of the 25 tasks.

CONCLUSIONS OF LAW

Neither party takes serious issue with the functional impairment awarded in this case. The ALJ merely subtracted the pre-existing impairment assessed by Dr. Veenis for the 1996 accident, pursuant to K.S.A. 44-501(c), and then averaged the two physicians' ratings, which yields 5.5 percent. The evidence, when reviewed as a whole, supports this finding and it will not be disturbed.

The fundamental dispute between these parties stems from the fact that claimant voluntarily terminated his employment with respondent in the face of what is clearly an effort to accommodate his restrictions. Thus, the Board must consider what constitutes "good faith" as that term is used in Kansas law.

In his Award, the ALJ concluded as follows:

This Court finds that the Respondent has made extensive and repeated attempts to keep the Claimant working. Any time that the Claimant complained, someone from Ergonomics would go to his job site in an attempt to satisfy the Claimant's complaints. Early in the Claimant's return to work he was wanting to be medically laid off. When the Claimant finally terminated his employment in August of 1999, the evidence is that the Respondent was still willing to work with the Claimant to accommodate his work site. The Claimant is asking for permanent partial disability based on a work disability as set out in K.S.A. 44-510e(a). This Court finds that the Claimant has not made a good-faith effort to continue to work for the Respondent and that the

Respondent has made a good-faith effort in order to keep the Claimant employed.⁶

The ALJ went on to explain:

It is admirable that after terminating his employment with the Respondent, the Claimant has continued his higher education, received his Bachelor's Degree at Friends University, and is now a graduate student at Emporia State University. However, he is not entitled to a permanent partial disability based on a work disability from the Respondent, in order to supplement any scholarship assistance that he might be receiving while he pursues his graduate education.⁷

The "good faith" referred to by the ALJ stems from the Kansas Supreme Court's findings in *Foulk*.⁸ In *Foulk*, the Kansas Court of Appeals held that a workers could not avoid the presumption against work disability as contained in K.S.A. 44-510e(a) by refusing an accommodated job that paid a comparable wage. In *Copeland*⁹, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident. If "good faith" is not found, then the finder of fact is authorized to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.¹⁰

Given the nature of the determination to be made, whether a claimant has demonstrated "good faith" is necessarily a factually driven decision. What constitutes "good faith" in one case may not necessarily be sufficient in another. The totality of the circumstances must be considered.

In this instance, the ALJ concluded claimant's actions in voluntarily terminating his employment in August of 1998 did not satisfy the "good faith" criteria. He based this upon the fact that respondent repeatedly and continually made efforts to respond to claimant's complaints of pain and alter the work to stay within his restrictions. At no time did

⁶ Award at 4-5 (citations omitted).

⁷ *Id.* at 5.

⁸ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

¹⁰ *Id.* at 320.

respondent fail to take action when claimant requested it do so. It was claimant who unilaterally withdrew from the work place by tendering his resignation on August 9, 1998.

Although claimant argues he was in a "catch 22" situation if he remained in respondent's employ, that argument does not exempt him from the consequences of his actions. While Dr. Veenis was certainly in favor of any patient furthering his educational goals, he did not advise claimant to stop working. Dr. Murati, claimant's physician of choice, testified that if claimant was having difficulty with his job he should have returned to see Dr. Veenis to express those complaints so that the restrictions could be re-examined. Neither of these physicians testified that claimant should quit his job. Moreover, Dr. Veenis indicated that claimant's work for respondent would likely cause him pain but would not necessarily cause further injury.

Under these facts and circumstances, the Board is persuaded that claimant's decision to voluntarily terminate his employment in favor of higher education, particularly when respondent was willing to accommodate his restrictions, negates his claim for work disability. Had claimant not quit his job, he would have continued to make the same wage he earned prior to his injury. Thus, the ALJ's finding that claimant's recovery in this matter is limited to the 5.5 percent functional impairment K.S.A. 44-510e(a) is affirmed.

The Board adopts the remaining findings and orders set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge John D. Clark dated March, 13, 2002 is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 Eric K. Kuhn, Attorney for Respondent and Insurance Carrier
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director